Supreme Court of the United States

October Term, 1962

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Docket No. 463

THOMAS I. FITZGERALD, Public Administrator of the County of New York, as Administrator of the goods, chattels and credits of ANDRES SAN MARTIN, Deceased,

Petitioner,

against

UNITED STATES LINES COMPANY,

Respondent.

REPLY BRIEF OF PETITIONER, THOMAS I. FITZGERALD, PUBLIC ADMINISTRATOR OF THE COUNTY OF NEW YORK, AS ADMINISTRATOR OF THE GOODS, CHATTELS AND CREDITS OF ANDRES SAN MARTIN, DECEASED

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In Response to Point I of Respondent's Brief

Respondent here seeks dismissal of the writ of ceritiorari as improvidently granted.

This Court rejected this argument, when, on December 10, 1962, it granted the writ of certiorari herein on the specific question which respondent now seeks to vacate in Point I of its present brief. The respondent does not set forth any new facts, developments or analysis that were not presented in its initial brief in opposition to the petition seeking the writ. Nor is there anything in this case and its short and simple record that respondent has pointed to that has only now been brought into proper focus that could warrant dismissal of the writ.

To the contrary, respondent's argument seeking dismissal of the writ underlines the seriousness of the error of the court below when it denied petitioner a jury trial on the maintenance and cure issues herein.

The trial court in effect ordered a separate and subsequent trial on the issues of maintenance and cure when it specifically directed that (R. 8):

> "* * * if there is any additional testimony necessary (with regard to the maintenance and cure issues) I will hear that *after* the jury has rendered its verdict." (Emphasis added.)

In thus causing the testimony relating to maintenance and cure not to be brought before the jury, the trial court affected the validity of the jury determination on the intertwined issues left to it. If it was error, as is respectfully alleged by petitioner here, to deprive petitioner of a jury trial on the maintenance and cure issues, the entire result below was affected by this error and the case should be reversed and remanded for a new trial on all issues.

The claim of the petitioner alleged aggravation of his injury as part of his Jones Act claim. The complaint sought not only to recover the outstanding and unpaid maintenance and cure (R. 4; Second Cause of Action, ¶¶ 15-17 of Complaint), but also damages for "failing to provide plaintiff with timely, adequate (and) proper * * * maintenance and cure, thereby aggravating his condition" (R. 3-4; First Cause of Action, ¶ 13 of Complaint).[1]

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[1] In *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, 376 (1932), this Court stated:

> "The failure to furnish cure is a personal injury actionable (under the Jones Act) at the suit of the seaman during life, and at the suit of his personal representative now that he is dead."

In *Sims* v. *United States of America War Shipping Adm'n*, 186 F. 2d 972, 973 (3rd Cir. 1951), *cert. denied* 342 U. S. 816, (1951), it was held that under the Jones Act the shipowner "* * * is liable for the consequential damages occasioned by the failure to provide for maintenance and cure after termination of the voyage when it was demanded."

This Court has only recently reaffirmed the clear obligation of a shipowner to pay maintenance and cure to an injured seaman when it is due, and held that failure to pay maintenance and cure when it is due will expose the shipowner to liability for all consequential damages. *Vaughan* v. *Atkinson*, 369 U. S. 527 (1962).

The latter claim did not involve mere empty pleading. The medical testimony on behalf of the petitioner submitted to the trial court alone at its subsequent hearings was to the effect that "conservative treatment" (R. 50):

> "• • • would partially restore the plaintiff to a condition in which he might work at non-arduous tasks such as an elevator operator, an assembler of parts or a job conducted in a sedentary manner."

Had the trier of fact found in petitioner's favor on this precise issue, petitioner would have been entitled to receive as a day maintenance for the extensive period involved and the amount of the cost of the medical care. In addition thereto petitioner would have been entitled to recover, pursuant to paragraph 13 of the first cause of action of his complaint, for the pain and suffering unnecessarily endured, the earnings lost, and the consequential damages arising out of the delay in providing him with maintenance and cure and the delay consequent thereto in enabling him to be fit to perform the "non-arduous tasks" of gainful employment described by petitioner's physician.[2]

The issues of whether there was unpaid maintenance and cure outstanding and the amounts and periods of time involved were vigorously disputed by the parties. Considerable evidence on these matters was presented to the trial court (R. 1, 47, 50-53).

However, unless and until it was determined whether respondent did in fact owe petitioner's intestate some sum of money for unpaid maintenance and cure, and unless and

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[2] This recovery could well have been substantial, for the delay in providing petitioner's intestate with maintenance and cure was extensive. Petitioner's initial demand for the outstanding maintenance and cure must be deemed to have been made no later than the time of the filing of his complaint, i.e., June 23, 1955 (R. 1). *Brown* v. *Draco Corp.*, 258 F. 2d 704 (3d Cir. 1958), *cert. denied*, 359 U. S. 960 (1959) affirming 157 F. Supp. 265 (W. D. Pa. 1957). The trial herein was not completed until June, 1960, five years later.

below in four subsequent hearings after the jury verdict (see until the periods of time and the injuries involved in such debt for unpaid maintenance and cure were determined, the jury could not render a judgment as to whether and to what extent respondent had *aggravated* petitioner's intestate condition by failing to provide the required maintenance and cure at the time it was due. Thus the retention by the trial court of the issue of what maintenance and cure payments were due necessarily interfered with and prevented a jury determination of what damages to allow the petitioner for aggravation, "hurt" (*Cortes, supra,* 287 U. S. at 371) or "consequential damages" (*Sims, supra,* 186 F. 2d at 973) caused by virtue of the respondent's failure to pay maintenance and cure when due, as alleged by petitioner in paragraph 13 of the first cause of action of the complaint (R. 3-4).

Accordingly, it is respectfully submitted that recognition of the error of the court below in depriving petitioner of a jury trial on the maintenance and cure issues requires reversal and remand for a new trial not only with regard to the second cause of action, but with regard to the entire Jones Act claim set forth in the complaint.

In asserting that the writ of certiorari herein should be dismissed as improvidently granted, respondent has also failed to recognize or discuss the issue of *when* the right to a jury trial on a maintenance and cure claim joined with a Jones Act claim attaches. If a seaman may lose his right to a jury determination on a maintenance and cure claim, which *arguendo* he would otherwise have, merely because the jury at the conclusion of the trial has found in favor of the shipowner on the Jones Act and unseaworthiness claim, utter chaos rather than fixed procedure will rule the roost in an area which provides a large bulk of federal district court litigation. The seaman, and the other parties, including the court, should be able to know from the outset whether or not the issues in the litigation are to be tried to a jury. If the seaman's right to a jury, although he has coupled his

maintenance and cure claim with a Jones Act claim arising out of the same incident, may be suddenly stymied or disappear at the very end of the trial, then the uncertainty and confusion involved cannot help but be destructive of orderly administration of these seaman's claims in the federal courts.

Accordingly, petitioner submits that his rights to a jury trial on the maintenance and cure issues became fixed at the time the complaint was filed on June 28, 1955 with proper jury demand on all issues (R. 1-2). At the time the trial court reserved to itself the determination of the maintenance and cure issues, on May 12, 1960, at the very opening of the trial and before any testimony had been heard or verdict been taken (R. 1-8), petitioner had a right to a jury trial on those issues. As aforestated, the denial of his jury right interfered with and invaded the proper jury disposition of all of the aspects of his Jones Act claim. For respondent to urge that the error of depriving a party of his basic and cherished procedural right of jury trial should now go uncorrected because of the resultant verdict on the negligence and unseaworthy contentions is to heap insult on injury, and contradict all concepts of reason, logic and justice.

In Response to Point II

Respondent here asserts nothing more than that under Article III of the Constitution federal courts are invested with admiralty and maritime jurisdiction, and that on the admiralty side, the court sits without a jury. What respondent seems to be unable to recognize is that the issue before this Court is not whether the federal courts have admiralty and maritime jurisdiction—no one has disputed that. The issue is rather whether a maintenance and cure claim, recognized in the state courts as a common law action and there fully entitled to a jury trial may be made pendent to a Jones Act claim and, as such pendent proceeding be tried to the same jury as hears and determines the Jones Act claim.

Respondent seems to believe that federal admiralty jurisdiction of maintenance and cure claims is exclusive and unique. Yet maintenance and cure claims are also tried before juries as common law claims in the various state courts. They have been so tried since before the Constitution and so continue to the present date.[3]

Thus, petitioner had two discrete avenues by which he might enter the federal court for the purpose of trying his claim for unpaid maintenance and cure. He might have filed a suit for maintenance and cure, without any other, on the admiralty side of the federal court. Had he elected to do so he would have come within the traditional admiralty procedure of trial without a jury.

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[3] The basic thrust of the opinion of the majority of this Court in *Romero* v. *Int'l. Term. Oper. Co.*, 358 U. S. 354 (1957)—as was argued by petitioner's counsel to the trial court at the outset of the instant controversy (R. 8)—was that claims by seamen for personal injuries brought pursuant to the general maritime law were common law, rather than federal law, matters, and that they were historically maintainable as common law suits in the state courts and to be treated accordingly in the federal courts. See particularly *Romero*, supra, 358 U. S. at 362-3, 372-4.

See also, *Madruga* v. *Superior Court of California*, 346 U. S. 556 (1954), where this Court stated (346 U. S. at 560-561):

> "Admiralty jurisdiction is 'exclusive' only as to those maritime causes of action begun and carried on as proceedings in rem, that is, where a vessel or thing is itself treated as the offender and made the defendant by name or description in order to enforce a lien. * * * It is this kind of in rem proceeding which state courts cannot entertain. But the jurisdictional act does leave state courts 'competent' to adjudicate maritime causes of action in proceedings 'in personam,' that is, where the defendant is a person, not a ship or some other instrument of navigation."

As was stated in that part of the opinion below which was unanimous, and there buttressed by authoritative decisions of this Court (306 F. 2d at 465, R. 66):

> "The common law is competent to give a common law remedy for breach of the obligation, created by the general maritime law, to pay maintenance and cure, namely, a money judgment against the operator of the ship. The saving clause thus permits a suit to that end in a state court, where a jury trial may usually be had."

However, petitioner had a second and distinct avenue of approach and entry. This involved an assertion of his claim for maintenance and cure as a common law "state" claim. In the circumstances here present he was able to append his maintenance and cure claim to his Jones Act claim arising out of the same incident, employment and injury. The Jones Act claim was a federal claim, entitled to jurisdiction and trial before a jury in the federal court, pursuant to the terms of the Jones Act statute and 28 U. S. C. § 1332. Inasmuch as a common law "state" maintenance and cure claim is entitled to a jury trial in state court, it would clearly be similarly entitled to a jury trial in federal court, if properly "pendent" to a related federal claim. It is this latter procedure that petitioner elected to follow, as demonstrated by the record, the pleadings (R. 2-5) and his claim before the trial court at the time this question was argued (R. 8-9).

Without question, petitioner's maintenance and cure claim was a valid, common law-state claim. In attaching it to a valid federal claim with which it was intertwined, petitioner was doing no more than invoking and relying on the well settled *Hurn* v. *Oursler* (289 U. S. 238; 1933) doctrine of this Court; *i.e.* that a state claim may be joined with a related federal claim for joint trial in a federal court.

Pendent jurisdiction of the federal courts over state common-law claims arising out of workingmen's personal injuries, when appended to substantially related damage suits under federal statutes for the same injuries, was recognized specifically in an opinion by Judge Mack in *Southern Pacific Co.* v. *Van Hooser*, 72 F. 2d 903, 911-912 (9th Cir. 1934). Judge Mack, who had authored the trial court opinion in *Hurn* v. *Oursler*, expressly recognized the applicability of the doctrine set forth by this Court's opinion in *Hurn* v. *Oursler* to the situation at bar.

Only one case (*Jacobs* v. *North Louisiana & Gulf R. Co.*, 69 F. Supp. 5; W. D. La. 1946) has been found by counsel dealing directly with pendent or ancillary federal court jur-

isdiction of a workingman's claim for personal injuries under the F. E. L. A. and a state compensation statute—the terrestrial equivalent of the seaman's Jones Act and maintenance and cure claims. In *Jacobs*, it was held that the federal court should determine a state workingman's compensation action, when coupled with a federal negligence action, even if the federal negligence claim should fail. The court stated (69 F. Supp. at 8):

> "The alleged facts and circumstances out of which the plaintiff claims recovery are the same under both statutes, the only difference being that, under the federal law, negligence must be shown and full damages are recoverable; whereas negligence or the lack of it makes no difference, but recovery is limited by the state statute. If the complaint has stated a lawful cause of action under the first and he should fail to sustain it with necessary proof, including his employment in interstate commerce at the time, then the question of his rights under the state act could properly be decided by this court. Having acquired jurisdiction because of the former issue, it would continue for decision of the latter. Siler v. Louisville & N. R. Co., 213 U. S. 175, 29 S. Ct. 451, 53 L. Ed. 753; Greene et al. v. Louisville & Int. R. Co., 244 U. S. 499, 37 S. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 97."[4]

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[4] The mere fact that the admittedly substantial "federal" claim under the Jones Act has been decided adversely to the petitioner does not divest the federal court of ancillary jurisdiction over the appended "state" claim for unpaid maintenance and cure.

In *Hurn* v. *Oursler*, 289 U. S. 238, 245 (1933) this Court stated: "[W]here the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the non-federal ground."

To the same effect are:

Armstrong Paint and Varnish Works v. *Nu-Enamel Corp.*, 305 U. S. 315, 324 (1938);

Musher Foundation v. *Alba Trading Co.*, 127 F. 2d 9, 11-13 (2d Cir. 1942, Clark, J. dissenting);

Hart & Wechsler, *The Federal Courts and the Federal System*—Note on Pendent Jurisdiction, pps. 802-809 (1953 Ed.).

It is respectfully submitted that the policy expressed and the result reached in the *Jacobs* case above cited is directly in keeping with the policies and decisions of this Court expressed with regard to jurisdiction of the federal courts and fair and efficient handling of damage suits by injured workmen, and that under the doctrines set forth by this Court on many occasions, the petitioner was entitled to pendent jurisdiction of his maintenance and cure claim and to a jury resolution of all of the disputed issues therein.

Once the civil side of the federal court accepts jurisdiction of the common law maintenance and cure claim as pendent to the Jones Act claim, it is constitutionally required under the Seventh Amendment to grant a jury trial to the common law claim. As was unanimously noted by the court below and not disputed by respondent, the maintenance and cure claim herein is a common law claim and would have been entitled to jury trial in the state court (306 F. 2d at 465, R. 66).

Petitioner did not need to, nor did he, rely at any time on the admiralty jurisdiction of the federal court to bring his maintenance and cure claim. If no admiralty jurisdiction had ever existed, petitioner would still have been fully entitled to bring the present action in precisely the same manner as he did bring it here.

In insisting on viewing the maintenance and cure claim as if it were and could only be a matter within the admiralty jurisdiction of the federal court, and ignoring the common law, "state," "pendent" basis for federal court jurisdiction and jury trial, the courts below committed error and deprived petitioner of his basic and inviolable right to a jury trial on the issues relating to his maintenance and cure claims.

In Response to Point III

Respondent here merely reprints Judge Friendly's comments below on the relationship of this Court's decision in *Hurn* v. *Oursler*, 289 U. S. 238 (1933) to the issues presented in the instant case.

Judge Friendly's contention was that the doctrine of *Hurn* v. *Oursler* could not effect civil, jury treatment of a maritime claim or transfer a federal admiralty matter to the civil side of the federal court. But, as aforestated, petitioner here sought merely to append a state civil claim to a substantial federal civil claim, and as to that, neither the opinions below nor respondent have cited any contrary authority, nor could they in light of *Hurn* v *Oursler* and the many cases following it.

However, even if petitioner had been doing what respondent and Judge Friendly allege—transferring an admiralty matter to the civil side—it is respectfully submitted that to serve the purpose of fair and efficient administration of justice, the federal courts have the power to direct and allow a jury trial on an intertwined and pendent maritime claim joined with another, civil claim which has such jury right as a matter of law. This power and authority was expressly exercised only recently by the Court of Appeals for the Second Circuit in *Bartholomew* v. *Universe Tankships, Inc.*, 263 F.2d 437 (2d Cir. 1959), *cert. denied*, 359 U. S. 1000 (1959), where the court directed and allowed jury trial of an unseaworthiness claim arising out of the general maritime law which was joined with a Jones Act claim relating to the same incident.

Respondent's statement at page 13 of its brief that "the power to grant (a jury) trial (on a maritime claim) rests solely in the Constitution and Congress" stands totally unsupported by citation of authority, and if the sentence is meant to assert that this Court and the federal courts do not have the inherent power and authority to grant a jury

trial in the circumstances here involved, then it stands in direct contradiction to the result in *Bartholomew* aforestated.

In Response to Point IV

Respondent here attempts to demonstrate that a Jones Act claim and maintenance and cure claim arising out of the same incident are not "intertwined" and are each "wholly independent and distinct from the other" (Respondent's Brief, p. 17).

The degree and extent to which a Jones Act and maintenance and cure claim are in fact intertwined and related have been demonstrated and detailed at length in petitioner's main brief (see particularly Point II, pp. 13-19 and the numerous authorities cited). The intertwining of these related claims, and the problems of collateral estoppel, assignment of burdens of proof, and duplication of awards is so clear that every judicial and scholarly commentator on the issue has noted the importance and value of allowing joint jury trial of the Jones Act and maintenance and cure claim. Even Judge Friendly, the only voice raised in opposition to this result, conceded in the opinion below that such joint jury trial would indeed be "desirable" (306 F.2d at 470, R. 74). It is worth noting again that respondent remained totally unable to summon up or cite a single authority in support of its contention that the Jones Act and maintenance and cure claims herein are not intertwined.

Conclusion

Respondent's brief in opposition fails to set forth any persuasive authorities or arguments rebutting the numerous decisions and articles by learned commentators submitted by petitioner in full support of petitioner's position herein.

Petitioner was clearly deprived of a right to a jury trial on the issues relating to maintenance and cure herein. Such deprivation prevented a proper jury determination of the issues raised in the complaint relating to damages for failure to pay and provide maintenance and cure, which claim for damages was an integral part of the petitioner's basic Jones Act claim.

Petitioner is entitled to reversal of the result below, and a remand directing a new trial of all of the issues and claims set forth under the Jones Act in the complaint.

Respectfully submitted,

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